UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

No. 15,887.
Civil Action.

CLINTON FOODS, INC., a Delaware Corporation,
Appellant,

vs.

MARVIN YOUNGS,
Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

APPELLANT'S REPLY BRIEF.

(Foreword eliminated as dealing with matters not now under consideration.)

REPLY TO APPELLEE'S I.

Appellee contends that the danger involved was not apparent. He discusses the location of the wire, the apparent insulation of it, and the fact that these were emergency transformers, and states that the lead-in wire was the only hazard in the area.

In our original brief, we discussed Mr. Youngs' experience with, and knowledge of, electricity. At the very least, he knew that some of the wires attached to the transformers carried 13,200 volts. He was not justified in assuming which was which. The statement that this was the

only hazard in the area is not correct. Mr. Shannon pointed to other wires, appearing on the exhibits, which were "hot" though at a lower voltage (R. p. 9).

It is claimed that Youngs was misled by the fact that the wire was neither out of reach nor buried. Yet, as appellee states on page 12, the wire "under normal conditions would have been far above his head." It would be as logical to contend that, if the wire had been buried but had been unearthed and exposed during the progress of the work, one would be misled by the fact that it was then accessible.

Mr. Youngs assumed that the emergency transformers were dead. He says that from some unidentifiable source, he learned that they were emergency. His assumption contrasts directly with that of Mr. Morgan that all transformers are hot (R. p. 20). We feel that it is common knowledge that in hospitals and plants which have a need for emergency power, the emergency transformers are almost invariably active at all times.

Certainly Mr. Youngs had no right to rely upon his unverified belief that the transformers in question were dead.

Appellee infers that it required the evidence of a Master of Science to bring out the fact that the electricity would arc ½ inch. We submit that **any** witness in this action could have testified that it would arc. Quite likely the average person would expect the arc to be greater than that and would hesitate to hazard a guess as to the distance. Perhaps it took an expert to establish the limit of the arc. Mr. Youngs, with his greater than average experience, knew that it would arc. Else why would he not "have gotten within three feet of it"?

The extent of the arc is so negligible as to render its existence immaterial. Can it be contended that, if Mr. Youngs was aware of the hot wire, he could reasonably

assume that he was safe so long as he didn't actually touch it—so long as he stayed a fraction of an inch away?

Appellee sets out three points upon which he claims reasonable minds could differ. Only the third of these would be a basis for a verdict. Defendant is not liable even if it originally created the danger, nor is it liable if it had exclusive control unless there was no warning.

The warnings that "everything in there was hot" and the "area was hot", were sufficient. Obviously, they could not be taken literally. The open areas could not have been hot for example but it cannot be contended that these warnings were insufficient. They would put any reasonable person on guard that anything, not obviously innocuous, was a possible source of danger.

The warnings as to the bus-bar did not minimize the general warning. They came at a time that the men were getting dangerously close. They no more lulled the plaintiff into a false sense of security than would the warning of a mother as to the imminent danger of a car bearing down on a child, cause the child to disregard a general warning to watch out for cars, trucks and buses while crossing the street.

The argument that Mr. Muter and the others being warned did not comprehend the warnings is specious. All of them were adults. They did not have to be electrical experts to understand that the area was "hot." If they could not appreciate that term, more specific warning would have been useless.

Under the doctrine of **Gowing v. Henry Field Co.**, warnings were sufficient regardless of circumstances. Therefore, the argument on page 16 of Appellee's Brief cannot prevail. The jury was foreclosed, **as a matter of law**, from concluding that warnings were not all the defendant could have been expected to do.

Appellee cites the note in 31 A. L. R. 2d 1375, to distinguish the Deaton case which was cited in Appellant's Brief. In that case the condition which the plaintiffs sought to remedy was the condition of the **poles.** The wires, including the one which electrocuted the plaintiff, were in good condition. The work in which plaintiff was engaged **at the time of the injury** involved merely the placing of new poles and not the transfer of the wires. He, too, was working in an area which brought him into proximity to a dangerous instrumentality. The South Carolina Court did not base its decision upon the rule cited by appellee, but upon the holding of **Gowing v. Henry Field Co.** and similar cases.

Appellee mistakes our intent in citing the Willis case. It was cited for the purpose of developing the proposition, borne out by **Engel v. Reider,** that where the duty to warn exists, it is discharged by warning the person with whom the owner is in privity.

Appellee attempts to dispose of **Gowing v. Henry Field Co.** summarily by pointing out what he considers distinguishing facts. The Court did not say "where plaintiff created his own danger the only duty is to warn," nor did it condition its definition of the duty upon the premises being "perfectly safe" in ordinary use. It said the duty is "to warn him of any **danger.**" As appellee points out, this case imposed a duty to use reasonable care. Everyone has the duty to use reasonable care to avoid injury to others. Appellee does not point out that the court not only **stated** this duty but **defined** it.

The Hull case also states the duty. It does **not** overrule nor even mention Gowing v. Henry Field Co. The court held that a jury question was presented as to whether precautions which had been taken satisfied the requirements of a statute which provided that every elevator and opening "shall be so constructed, guarded, equipped, main-

tained, and operated as to render it safe for the purposes for which it is used * * *."

In a 5-4 decision, the court held that the statute was applicable and that its terms were so general that a jury could properly pass upon whether or not it had been complied with. The dissenting members of the court did not cause their dissent to be published, but their reasoning can be obtained by reading the majority opinion in the original decision, superseded by this decision, which appears at 24 N. W. 2d 364.

In **Stupka v. Scheidel**, there was no warning of danger. On the contrary, engaging one to wash windows—a job which will normally entail reliance upon the screw eyes—amounts almost to a warranty that they are safe. In effect, the defendants were providing part of the equipment used **in performance of the work.** We agree that, having invited plaintiff to **use the screw eye**, defendants were bound to discover any defect and **make** it reasonably safe.

Steele v. Grahl-Peterson does impose the duty of exercising reasonable care to avoid exposing others to injury, but the contention that the duty established is the same as that owed to an employee, is misleading. The Court stated that the duty to "keep" the premises in a safe and suitable condition was the same as that imposed upon an employer. It imposed no duty to "make" them safe.

The defendant had replaced a burned out floor with concrete, designedly leaving a hole in it. The concrete was not supported at an edge of the hole and crumbled under plaintiff's weight. The weakness was hidden by the concrete, and the workers in the area assumed the floor was safe. It was alleged that the defendant failed to furnish a safe place to work, failed to give notice of the defect, and failed to properly guard the opening. The Court cited with approval, **Samuelson v. Mining Co.**, 49 Mich. 164, 13 N. W. 499, to the following effect:

"Every man who expressly or by implication invites others to come upon his premises assumes as to all who accept the invitation the duty to warn them of the danger in coming which he knows or ought to know of and of which they are not aware. This is a very just and very familiar principle."

In discussing whether or not there was evidence to support any allegation of negligence the court held that the jury could have found that the floor was defective and the defect was hidden by the concrete. Thus, the defendant was affirmatively negligent in **creating** the defect and hiding it. In discussing assumption of risk, the court said:

"True the hole through the floor was patent to the eye and plaintiff assumed whatever risk was naturally incident to stepping over it or about it, but no negligence is charged on account of the existence of the hole. The alleged negligence consisted in the defective condition of the flooring near the hole, and this defect, and not the hole through which he fell, is relied upon as the proximate cause of plaintiff's injury. If this defect was concealed, or not open to casual observation, as plaintiff's evidence seems to show, he was under no duty to make minute investigation, but could rightfully assume that defendants had performed their duty providing a reasonably safe support for the floor or concrete on which he was expected to walk and work."

That the defendant did not "keep" the area safe, which was the basis of the decision, is obvious. Where the work done results in creating, or failing to remedy a dangerous condition, a third party, whether an employee of a subcontractor or any other visitor, can look to both the owner and the contractor who did the work and demand a safe place in which to be. The Court approved the very rule upon which we rely—that it is the duty of the owner to

warn of dangerous conditions. In fact, Steele v. Grahl-Peterson was the authority for the decision in Gowing v. Henry Field Co. Therefore, it is obvious that the Supreme Court of Iowa found nothing inconsistent with the doctrine which it stated in Gowing v. Henry Field.

Appellee's contention as to the intent of the Court in the Neimeyer case is incorrect. The discussion of control of the machinery was to develop the fact that Kessler was **not** an independent contractor. The Court viewed Kessler's "employment" as involving the conversion of wood blocks into shingles, using the defendant's equipment, and said:

> "It seems to us to be a question of the liability of the defendant for its own negligence. In the cases cited, the employment of the contractor is that of independent character. * * * It seems to us that this case is widely different from those cited * * *. He undertook to furnish the labor by which the company could, in **its mill**, and by **its machinery** and appliances, **owned** and **operated by itself**, manufacture the shingles. Kessler had no more control or authority over the machinery than he would have had had he worked by the day or week. We think the obligation of the defendant company as to care in keeping in repair and operating the machinery, as to Kessler himself, was the same under the contract by which Kessler was to do the work at so much per thousand, **as if he did the work by the day or week.** Kessler was **not to manufacture** the blocks into shingles but **only to do the manual labor** for the purpose, and **the defendant was to do the rest**; that is, to **furnish and operate** the machinery for that purpose. The rule of reasonable care obtains under such an **employment.** The stipulation of facts shows that in the employment, the defendant knew that others than Kessler would work about the machinery it was to operate, and we think the same care and diligence obtained as to such

employees, although under the immediate employment of Kessler." (Emphasis supplied.)

The Court reached the conclusion that a company which procures the services of a person termed an independent contractor to manufacture its product in this manner cannot thereby avoid its duty, **as a master**, to provide a safe place to work. Otherwise, any plant could avoid the duty by designating all of its foremen as independent contractors and letting them hire the rest of the employees. The Court did not disagree with the rule upon which the directed verdict was based, but said that the case was distinguishable.

We are not attempting to persuade this Court that one in Youngs' position has no better status than that of a bare license. On the contrary, the rule announced in Gowing v. Henry Field was applied to invitees. The court specifically stated that "plaintiff was an invitee and it was defendant's duty to warn". Therefore, Clinton was precisely as liable to him for its own acts as it would have been to those used as examples by appellee. However, its acts of negligence would consist, under Iowa law, wholly of failure to warn.

We submit that the case of **Buck v. Walsh**, tends to bolster our theory of the case more than it does that of the appellee.

In connection with **Yarn v. Ft. Dodge D. M. & S. R. Co.**, we point out the fact that defendant supplied electricity to approximately 17 business places and therefore was subject to the provisions of Chapter 389.15 of the Code. In addition, the opinion of this Court states that "the defendant then strung a 22,000 volt uninsulated wire in close proximity to a conductor, a pipe, it knew someone would be working on." The case differs from the one at bar because Youngs was not doing work which was fore-

seen at the time the equipment was installed, but was engaged in a project which had not even been conceived at that time.

In **Reynolds v. Iowa Southern Utilities Co.**, the presumption created by Section 389.15 was applicable. In addition, lines which could have been adequately insulated but were not, passed through a tree and were permitted to remain although it was common knowledge that boys had played in the trees for several years, and the "wires had a ragged appearance and in this particular tree snapping and sparks had been observed for a considerable period of time."

In **Detroit Edison Co. v. Ewing**, the defendant, an Electric Public Utility Company, had installed wires carrying 110 volts, which were not taped or insulated, and which were left with the ends sticking up about two inches.

In the **McCready case** the defendant moved into a new building before completion and, disregarding the presence of workmen on the premises, ran power into the area where plaintiff was working. Until three days prior to the accident no power had gone into these wires. It was then turned on and left on despite requests by plaintiff's foreman that it be turned off. It created a dangerous condition which had not existed at the inception of the contract. This was an affirmative act of negligence. The Court pointed out that while the defendant was under no **affirmative duty** to keep the premises safe, it was under the duty to refrain from **actively creating** a danger. Similarly Clinton was under no "affirmative duty" to shut off the power, but was under a duty to refrain from "actively creating a danger." It did not violate that duty.

The California Court commented upon the unexplained refusal to shut off the power. In the Youngs case we did not refuse, for no request was made, and we have explained why the power was not shut off.

The Court also specifically recognized the different rule prevailing in that state between an ordinary invitee and an employee of an independent contractor, likening the duty toward the employee to that owed the contractor. In view of Gowing v. Henry Field, there is absolutely no difference in Iowa between the duty owed a contractor and that owed any other invitee. In Iowa, the duty owed is identical, notwithstanding California law on the subject.

The Theissen, Dunn and Jordan cases involved plaintiffs who were not experienced with electricity and did not know it would are. Mr. Youngs knew that it would.

Appellee cites but does not argue **Public Service Co. of New Hampshire v. Elliott.** There, although the [illegible] posed parts were within reach from the floor, and although defendant's employee had led plaintiff into a high-tension room and by "positive conduct" brought him into the danger zone, the Court held that adequate warning, as a "more practical alternative" than shutting off the power, would have sufficed.

Appellee cites Restatement, Torts, Section 343, which merely distinguishes between the duty owed to a bare licensee and that owed to a business visitor, the distinction being that as to the former, the owner is bound only by his actual knowledge, but toward the latter he is chargeable with constructive knowledge and must seek and become aware of any dangers.

Appellee also cited the Texas case of **Smith v. Henger.** There Henger had expressly assumed all duties of the owner. Plaintiff fell into a hole which had cutomarily been covered by timbers which in turn were covered by canvas. The hole had been so covered when he left work the night before the accident, and appeared the same the next morning. The Court held that whether or not it was a direct employee of the contractor who had removed

the timbers, it was up to him, because of his control of the entire project, to ascertain the situation and guard against it. Although **an affirmative** act, by someone under his jurisdiction, had made the area unsafe, the Court limited the negligence of the contractor to his failure to ascertain and **warn of the danger** and cited the Iowa case of **Gardner v. Waterloo Cream Separator Co.**, 134 Ia. 6, 111 N. W. 316, as authority for the latter proposition.

REPLY TO APPELLEE'S II.

Appellee shrugs off any negligence of Pittsburgh by maintaining that such was merely concurrent with that of Clinton and by contending that Clinton is trying to escape by delegating duties owed by it. If our contention is correct and Clinton's sole duty was to warn, if necessary, that is the only duty which it could have attempted to delegate. It did not have the duty of providing a safe place to work nor the duty—at least in the absence of a request—to shut off the power or to provide barricades. Therefore, there is no attempt to delegate these duties.

Appellee states that if Pittsburgh was negligent in contracting to do the job in an unsafe place, Clinton was concurrently negligent. If Clinton was negligent in this respect, anyone who contracts to buy dynamite is negligent in entering into a contract whereby the manufacturer finds it difficult or impossible to discharge **his** duty to provide a safe place. Clinton's only duty was to warn. In warning the employer, Clinton did not delegate its duty—it **discharged** it. Delegation of the duty would have occurred had Clinton relied upon a **third party** to warn Pittsburgh's men. To such a situation, the sections of C. J. S. and Am. Jur., cited by appellee, would properly apply.

While Mr. Shannon testified that he had noticed nothing that was not properly entailed in the work, it must be borne in mind that he is not a lawyer and did not view

the situation from the standpoint of Pittsburgh's duty to provide a safe place to work. Viewing the project from the standpoint of convenience, he approved the methods.

Pittsburgh undertook this job with knowledge of the "hot" area and with knowledge of the plans procured by defendant. It piled the dirt which rendered an otherwise safe condition hazardous and it, **not the defendant,** had the duty of providing a safe place to work.

It is unreasonable to contend that exclusive control was in the defendant. It reserved no control over methods utilized by Pittsburgh. The testimony that there was no place else to put the dirt cannot overcome the obvious fact that there was. There was a space approximately seventeen by eighteen feet, shown on Plaintiff's Exhibit 2, which could have been used. Pittsburgh could have wheeled the dirt out of the enclosure just as the pieces of pipe were brought in, had it been necessary. It cannot be inferred that the contract vesting control of the manner of executing the project in Pittsburgh, specified where the dirt was to be piled.

We do not accuse Pittsburgh of choosing the more dangerous of two otherwise equally desirable alternatives. Obviously it was more convenient for Pittsburgh to pile the dirt where it did than to put it elsewhere. However, the inconvenience or added expense of taking safety measures have never been held to excuse an **employer's** failure to provide a safe place to work.

Suppose that Pittsburgh had requested that the power be turned off. Clinton could have insisted that a qualified man be stationed at the switches. Would it not have requested, and with absolute justification, that Pittsburgh pay that man's salary? Is there any doubt that, had Pittsburgh suggested that it was necessary to find some other place for the dirt, Clinton would have acquiesced (although Pittsburgh had that right regardless) provided

that Pittsburgh did the extra work? Why? Because it had contracted to do a job at a contract price which, as in every contract, reflected the elements which made the project easy or difficult.

Control of the methods was exclusively in Pittsburgh and embodied the decision of where to place the dirt. True, Clinton could not delegate any duty owed by it, but neither could Pittsburgh delegate its duty to provide a safe place to work merely because it would thus derive benefits in the direction of convenience and reduced expense.

(Reply to Appellee's III eliminated as dealing with matters not now under consideration.)

REPLY TO CONCLUSION.

We must take issue with several statements of fact contained in appellee's conclusion. The record does not show that "defendant at all times had available devices calculated to shield the dangerous wires." It merely shows that defendant offered to provide such devices.

Appellee states that, at other times, "for purposes of its own convenience and presumably for the safety of those involved in the area" Clinton had shut off the power. This distorts the testimony of Mr. Shannon that they "have never been out of service unless we wanted to work on them" (R. p. 14), and ignores his testimony that "we have to work within inches of the hot wires frequently" (R. p. 10).

While appellee has attempted to extend the duty beyond that which the Iowa law establishes, he has repeatedly stated that if the duty is merely to warn, the question of adequacy is for the jury. He ignores the fact that his foreman "personally knew these transformers were hot" (R. p. 20) and told the men that the wires and transformers were hot (R. p. 21). Unquestionably, Morgan knew that the

wires were hot. Under the doctrine of **Engel v. Reider** (ignored by appellee), which is logical; has never been rejected by the Iowa Court; and which finds support in White's Supplement to Thompson on Negligence, Sec. 978, the duty extends only to warning the contractor if he is unaware and defendant "did not need to go so far as to notify" Youngs.

The jury could have found for the plaintiff only if it found that **Morgan** was unaware **and** had not been adequately warned. Reasonable minds could not differ as to this and no jury question as to adequacy of the warning was presented.

WAYNE G. COOK,
CRAIG COOK,
409 Putnam Building,
Davenport, Iowa,
Attorneys for Appellant.

COOK, BLAIR, BALLUFF, WEDEAN & NAGLE,
409 Putnam Building,
Davenport, Iowa,
Of Counsel.